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Supreme Court of the United States

October Term, 1996

BROWN UNIVERSITY, et al.,

Petitioners,

vs.

AMY COHEN, et al.,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The First Circuit Case No. 95-2205

BRIEF OF *AMICUS CURIAE* COLLEGE FOOTBALL ASSOCIATION IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF AMICUS CURIAE

The College Football Association ("CFA") was formed in 1977 to improve major college football by upgrading academic standards for players, improving recruitment practices, and broadening television exposure for college teams. CFA's 69 members include all of the universities that participate in the Atlantic Coast Conference, the Big East Conference, the Big 12 Conference, Conference USA, the Southeastern Conference, the Western Athletic Conference, as well as independent schools such as Notre Dame and the Military and Naval Academies.

CFA and its members share a commitment to fulfill the mandate of Title IX, 20 U.S.C. §§ 1681-1688, by expanding athletic opportunities for women and enabling women – as well as men – to develop their full potential in athletics. CFA recognizes, however, that college football is at the heart of the dilemma created by the judgment of the United States Court of Appeals for the First Circuit in this case.

The Court of Appeals interpreted Title IX to require participation by men and women in varsity athletic programs in statistical proportion to their enrollment. If an institution has an equal number of men and women in the student body, the court's ruling means that the institution must have equal numbers of male and female participants in varsity athletics. That might be achievable – but for football. There is no sport for women comparable to football. The easiest solution – one that is consistent with Title IX – is to exempt football from the

opportunities for participation that are counted in determining proportionality.

Intercollegiate football is unique among sports: the size of the teams and the revenue the teams produce distinguish football from other sports, both men's and women's. The Court of Appeals' interpretation of Title IX requires universities either to expend scarce resources on additional intercollegiate teams for women or to eliminate existing intercollegiate teams for men. Eliminating football, at least at CFA member schools, is not a likely solution because the revenue from football supports all other sports and the traditional goodwill generated by football attracts alumni contributions to all programs within a university.

Amicus CFA files this brief to describe its view of the flaws in the Court of Appeals' analysis and to explain the negative consequences of that analysis for all students at CFA member institutions.

ISSUE ADDRESSED

Whether a university violates Title IX when it takes the nature of particular sports into account and accommodates the athletic interests and abilities of male and female students equally effectively even though men and women do not participate on the university's varsity teams in proportion to their enrollment.

REASONS FOR GRANTING THE PETITION

I. The Ruling Below.

The Court of Appeals acknowledged that it is "unlikely" that "the athletic establishments of many coeducational universities reflect the gender balance of their student bodies." *Cohen v. Brown University* ("*Cohen II*"), 991 F.2d 888, 898 (1st Cir. 1993); Pet. App. 189a. It also acknowledged that "in an era of fiscal austerity, few universities are prone to expand athletic opportunities." *Id.* Nevertheless, the Court ruled that a claim of unlawful sex discrimination can be made under Title IX if the plaintiff shows "disparity between the gender composition of the institution's student body and its athletic program" and that "the underrepresented gender has not been 'fully and effectively accommodated by the present program.' " 991 F.2d at 901-02; Pet. App. 189a. The Court's ruling was based on a three-part test in a "Policy Interpretation" issued by the Department of Health, Education and Welfare (now the Department of Education) in 1979. 45 C.F.R. Part 86 (1979).

According to the Court, if a school does not meet the proportionality requirement, it "must fully and effectively accommodate the underrepresented gender's interests and abilities, even if that requires it to give the underrepresented gender (in this case, women) what amounts to a larger slice of a shrinking athletic-opportunity pie." *Cohen II*, 991 F.2d at 906; Pet. App. 198a. The Court noted that compliance with Title IX may be

achieved "by reducing opportunities for the overrepresented gender." *Id.* at 899 n. 15; Pet. App. 183a.[1]

Cohen II affirmed the entry of a preliminary injunction requiring Brown University to provide university-funded women's gymnastics and volleyball teams. Brown had also cut – for financial reasons – university-funded men's golf and water polo teams; the injunction did not restore those teams. After trial on the merits, the majority of a different First Circuit panel adhered to the legal test developed at the preliminary injunction stage of the case. *Cohen v. Brown University* ("*Cohen IV*"), 101 F.3d 155 (1st Cir. 1996).

II. The Impact of the Ruling Below.

The legal test in *Cohen II* will have a dramatic impact on all men's sports, including football. Despite the expansion of women's athletic programs after Title IX's passage in 1972, women continue to participate in varsity, club and intramural sports far less often than do men. To meet a proportionality requirement, a university must either induce more women to participate in sports in order to accommodate the numbers of men who are eager to be part of a competitive sports program or reduce the number of intercollegiate sports opportunities for men.

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[1] Relying on *Cohen II*, 991 F.2d at 898, another appellate court ruled that the University of Illinois could eliminate its men's swimming program without violating Title IX because men's participation in athletics – even after the elimination of the swim team – would "continue to be more than substantially proportionate to their presence in the University's student body." *Kelley v. Board of Trustees*, 35 F.3d 265, 270 (7th Cir. 1994).

Given limited financial resources, universities are more likely to reduce the sports opportunities for men. Participation by men in intercollegiate athletics decreased by 5.7% between 1984 and 1994, a result of financial limitations at universities and colleges throughout the country. NCAA Participation Statistics Report, 1994.

Not surprisingly, college programs reflect the participation rates at the high school level – about 62% male and 38% female.[2] The Sports and Recreational Programs of the Nation's Universities and Colleges, NCAA Report Number 8 and The National Federation of State High School Associations Survey Data, 1994. Two million girls play on high school teams, compared with 3.4 million boys. State High School Associations Survey Data, 1994. The number of slots on intercollegiate teams at National Collegiate Athletic Association ("NCAA") institutions is about 295,000. NCAA Participation Statistics Report, 1994. If participation rates remain the same from high school to college, only one in 18 high school athletes will participate in intercollegiate athletics. If, however, women are entitled to about half of the NCAA slots, based on their proportion in the college population,[3] one

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[2] Three times as many men as women play intercollegiate club sports, and eight times as many men as women play on college intramural teams. NCAA Gender Equity Study, Summary of Results, March 1992, and CFA Participation Survey, July 1994.

[3] Not all student bodies are approximately half male and half female. Georgia Tech's student enrollment is 75% male and 25% female. The University of North Carolina has a student population that is 42% male and 58% female.

in 14 female high school athletes will participate in intercollegiate athletics compared with one in 23 male athletes.

Reduction of athletic opportunities for men may be accomplished either by reducing the size of men's teams or by reducing the number of men's teams. More likely, a decrease in athletic opportunities for men will reduce the number of men's teams because men's teams on average are larger than women's. Football teams are the largest teams in intercollegiate athletics. The average football squad at the NCAA Division 1-A level has 117 members.[4] The next largest men's teams in Division 1 are lacrosse, with an average of 39 members, track and field with 36, and baseball with 34. NCAA Gender Equity Study, Summary of Results, March 1992. The largest women's teams in Division 1 are lacrosse, with an average of 27 members, and track and field, with an average of 25. *Id.*

Although *Cohen II* may result in the elimination of some football teams – or their reduction in size – it is unlikely that football will be eliminated at CFA member schools. Football provides the revenue that supports the other athletic programs. According to the CFA's most recent financial survey for the 1994-95 academic year, football was responsible for 63 percent of the total revenue generated to fund a member's athletic program. Men's basketball generated an additional 20 percent of an athletic department's revenue. Revenue from women's

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[4] Approximately 50 team members play in a game; the team members who do not regularly play in scheduled games play as the "scout team" at all practices, providing opponents for the specialized "starting teams" and gaining experience for future competitive play.

sports was less than one percent of the total income, an average of approximately $90,000 per member. Average operating costs for women's sports were $1.9 million.

Football revenues are crucial to college athletic programs, and successful football programs produce increased alumni contributions for a broad range of university programs. Instead of eliminating football, universities are more likely to eliminate a number of other men's teams to compensate for the size of football teams.

III. The Governing Statute, Regulations and Policy Interpretation.

The legislative history of Title IX reflects the unique position of football in intercollegiate athletics. Title IX of the Education Amendments of 1972 provides:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

20 U.S.C. § 1681(a). The Javits Amendment to Title IX, adopted by Congress in 1974, further provides:

> The Secretary of [HEW] shall prepare and publish . . . proposed regulations implementing the provisions of Title IX of the Education Amendments of 1972 relating to the prohibition of sex discrimination in federally assisted education programs *which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.*

Pub. L. No. 93-380, 88 Stat. 612 (1974) (codified at 20 U.S.C. § 1681 note) (emphasis added). Congress adopted

section 844 after the Conference Committee deleted a Senate floor amendment that would have exempted revenue-producing athletics from Title IX. 45 C.F.R. Part 86, 44 Federal Register at 71,413.

The regulations that Congress directed in 1974 provide as follows:

> (a) *General.* No person shall, on the basis of sex, be excluded from participation in . . . any interscholastic, intercollegiate, club or intramural athletics offered by a recipient. . . .
>
> (b) *Separate teams.* Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose of major activity of which involves bodily contact.
>
> (c) *Equal Opportunity.* A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors

> . . . Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes. . . .

34 C.F.R. § 106.41 (1995).

The three-part test that provides the basis of the Court of Appeals' ruling does not appear in Title IX or its implementing regulations. Instead, it is a relatively brief part of a lengthy Policy Statement promulgated by HEW's Office for Civil Rights in 1979. The Policy Statement describes the three-part test as follows:

> 5. In effectively accommodating the interests and abilities of male and female athletes, institutions must provide . . . the opportunity for individuals of each sex to participate in intercollegiate competition. . . .
>
> a. Compliance will be assessed in any one of the following ways:
>
> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are underrepresented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or

> (3) Where the members of one sex are underrepresented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. 71,413 (Dec. 11, 1979). The three-part test – considered in isolation by the Court of Appeals – does not refer to the nature of particular sports.

IV. The Legal Standard Applied by the Court of Appeals Is Irreconcilable with Title IX and the Implementing Regulations, Which Require that a University Take the Nature of Particular Sports into Account When It Accommodates the Athletic Interest and Abilities of Male and Female Students Equally Effectively.

The Court of Appeals' legal analysis is not supported by the language or purpose of Title IX or the implementing regulations. Title IX requires universities to equally accommodate the athletic interests of both men and women. Title IX does not require universities to provide representation of men and women on varsity teams in statistical proportion to enrollment. The Court of Appeals, however, in effect mandated numerical equivalence and concluded that whenever there is statistical imbalance, the university must fully accommodate all athletic interests and abilities of women, regardless of the

impact that accommodation may have on other university programs.

Relying on § 106.41(b) of the regulations implementing Title IX, the dissenting judge in *Cohen IV* suggested that the simplest way of resolving the problems that arise from the Court's legal analysis would be to allow exclusion of the members of a football team from the calculation of proportionality. 101 F.3d at 192-93; Pet. App. 70a-71a. Under the regulation, universities are allowed to have men's teams in contact sports without providing a matching team for women or allowing women to try out for the men's team. (In fact, of the contact sports, only football, wrestling and boxing are without corresponding women's teams.) Counting the participants in football, the contact sport that requires a large number of participants, "skews the numbers of athletic participants – making it impossible for the university to provide both men's and women's teams in other sports." 101 F.3d at 192-93, Torruella, C.J. dissenting; Pet. App. 71a.

The dissent recognizes that the Javits Amendment to Title IX directs the administering agency to take into account the nature of particular sports in assessing compliance: the agency should consider the varying number of players needed for different sports when assessing compliance with Title IX. Recognition of the fact that there is no intercollegiate sport for women that involves the large number of participants that are on a football team takes into account the nature of football. If football is taken out of the proportionality equation, it is easier and more realistic to provide intercollegiate sports participation opportunities for both men and women that are

proportionate to enrollment and that reflect student interest.

The portion of the Policy Interpretation relied upon by the Court of Appeals does not make an adjustment in the overall proportionality requirement to take into account that women are not involved in football, even though football is a key component in the overall demand for sports. The failure to exclude football from the proportionality requirement results in universities trying to induce women to participate in sports, not so that they will benefit, but in order to be able to accommodate men who are eager to be part of a competitive sports program.

The *Cohen II* Court's interpretation of the three-part test in the Policy Statement overlooked the Policy Interpretation Summary, which states: "Pursuant to the regulation, the governing principle in this area is that the athletic interests and abilities of male and female students must be *equally effectively accommodated.*" 44 Fed. Reg. 71,414 (Dec. 11, 1979) (emphasis added). Without basis in the language of Title IX, its implementing regulations or the record in this case, the Court assumed that interest and ability to participate in sports is equal as between all men and women on all campuses.

It is "more logical that interest in participation and levels of ability to participate as percentages of the male and female populations will vary from campus to campus and region to region and will change with time." *Pederson v. Louisiana State University*, 912 F. Supp. 892, 913-14 (M.D.La. 1996). Allowing each university or college to equally effectively accommodate the athletic interests of male and female students prevents interference with the

freedom of academic institutions to choose their mix of students, to control the emphasis they wish to place on particular sports, and to foster a learning experience for all students.

CONCLUSION

The United States Court of Appeals for the First Circuit has misinterpreted Title IX and its implementing regulations. Title IX does not mandate numerical proportionality. Rather, it requires equal opportunity to participate in intercollegiate athletics for both sexes. Equal opportunity to participate is to be assessed not in a rote numerical fashion, but in a common sense fashion – by taking into account the nature of a sport and the athletic interests and abilities of male and female students. The Court's decision creates the legal and practical problems described in Brown's Petition for Writ of Certiorari and has negative consequences for all students at CFA member institutions. Therefore, amicus CFA urges the Court to grant the Petition and issue a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Respectfully submitted,

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